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No. 97-998

IN THE

Supreme Court of the United States

October Term, 1997

UNITED STATES ex rel. STANLEY RABUSHKA
AND STANLEY RABUSHKA,

Petitioner,

v.

CRANE CO.,

Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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February 17, 1998

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether summary judgment dismissing plaintiff's action under the False Claims Act was properly granted upon defendant's uncontradicted proof that the Pension Benefit Guarantee Corporation's actions were not affected by the nondisclosure complained of by the plaintiff?

Whether plaintiff's claim that the Pension Benefit Guarantee Corporation should have followed policies different from those actually implemented presents an issue triable by a jury under the False Claims Act?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

This is to certify that respondent Crane Co. has no corporate parents, subsidiaries or affiliates that have issued shares to the public.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for a writ of *certiorari* seeking review of the opinion of the Court of Appeals for the Eighth Circuit reported at 122 F.3d 559.

COUNTERSTATEMENT OF THE CASE

The petition is based on an asserted conflict between the Eighth Circuit opinion below and this Court's opinion in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972) which does not exist. The Circuit Court opinion below affirmed a grant of summary judgment based on respondent Crane's uncontradicted showing that the actions of the Pension

Benefit Guarantee Corporation ("PBGC") were not in any way affected by the nondisclosure complained of. (at A11)[1] As shown at p. 9 below, every Circuit Court which has considered the issue has decided that the presumption of reliance articulated by this Court in *Affiliated Ute* may be rebutted upon an appropriate showing by defendant. Respondent Crane made such a showing and the Eighth Circuit properly affirmed the grant of summary judgment.

Petitioner proceeds to argue that the Circuit Court erred in failing to consider his argument that the PBGC should have followed policies relating to the termination of pension plans different from those actually implemented by the PBGC. Petitioner's argument that the PBGC should have followed different policies does not raise a question which may be determined by a jury in the guise of a claim asserted under the False Claims Act. Petitioner's quarrel with the PBGC does not constitute circumstantial evidence of the PBGC's reliance.

Facts and Proceedings Below

Crane is a diversified company engaged in the manufacture of engineered products for industry, aerospace and defense. At an earlier time, Crane also held interests in certain heavy industrial manufacturers, including Colorado Fuel & Iron (CF&I), of which Crane became the majority stockholder in 1969. (at A18) During the 1980s Crane reoriented its business by divesting itself of its interests in heavy industry. As part of this program, Crane spun off its shareholding in CF&I in May 1985.

Petitioner's False Claims Act action is premised on the claim that the PBGC would have terminated a pension plan maintained by CF&I (the "Plan") and asserted claims against Crane at the time of the spinoff in May 1985 if a certain disclosure had been made.

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[1] Citations are to petitioner's Appendix.

CF&I established the Plan in 1950, long before Crane acquired its stockholding in 1969. (at A18) The Plan was insured under the Employee Retirement Income Security Act, 29 U.S.C. § 1301 *et seq.* ("ERISA"). (at A18) CF&I financed and administered the Plan at all times. (at A18) ERISA and the PBGC regulations impose certain reporting requirements on the Plan Administrator, including an obligation to file Notices of Reportable Events or "NREs" on certain occasions. 29 U.S.C. § 1343, 29 C.F.R. § 2615. (at A18) From 1977 to 1986, the Plan Administrator was Mr. Lawrence Hegstrom, a CF&I employee; thereafter CF&I was the Plan Administrator. (at A18) Crane was at no time either the Plan Administrator or a contributor of funds to the Plan. (at A18)

CF&I funded its pension plan aggressively during the late 1970s so that no additional funding was required in the early 1980s. At the date of the CF&I spinoff in May 1985, the Plan had assets of $45,000,000 and was making pension payments of about $5,000,000 a year. (at A12)

CF&I enjoyed the best year of its 100-year history as the largest steelmaker west of the Mississippi in 1981, with sales of $723 million and income of $39 million. CF&I suffered an abrupt reversal of fortune in 1982 as the oil well tubing market on which it depended collapsed. (at A20) CF&I's business rebounded in 1984 and 1985 so that its cash flow became positive at $29 million in 1984 and $12.5 million in 1985. CF&I's improved performance resulted in net working capital of $34 million in the month of the spinoff, May 1985—an amount which exceeded its working capital at the height of its success in the Fall of 1981. CF&I's business plan adopted in late 1984 for the period from 1984 to 1988 showed increasing sales and earnings and culminated in forecasted operating profits of $69 million and a year-end cash balance of over $70 million in 1988, after payment of all of CF&I's pension obligations.

That was the financial picture when CF&I was spun off in May 1985: positive cash flow, record working capital levels, increasing projected earnings, and a pension plan with $45,000,000 in assets as against about $5,000,000 in annual payments.[2]

Mr. Hegstrom, the CF&I Plan Administrator, timely filed the Notice of Reportable Event ("NRE") required as a result of this spinoff with the PBGC, notifying the agency under 29 C.F.R. § 2615.23 that the spinoff was "a transaction involving a transfer . . . of ownership interest in a contributing sponsor" and sending all of the information required, including the most recent financial statements of CF&I and the Plan. (at A4)

The thrust of petitioner's complaint is that Mr. Hegstrom should also have filed an NRE under 29 C.F.R. § 2615.22 describing the spinoff as a transaction to implement a liquidation. The premise of petitioner's claim is that Crane officers "knew" in May 1985 that CF&I would enter bankruptcy some five years later (CF&I entered bankruptcy in November 1990) and that Crane was required to notify Mr. Hegstrom of their opinion. Petitioner claims that if Mr. Hegstrom had filed the additional NRE in May of 1985, the PBGC would have terminated the CF&I Plan and asserted claims against Crane as CF&I's parent corporation. (Petition, at 12)

The Circuit Court affirmed the grant of summary judgment against petitioner on the grounds that Crane had conclusively proven that the PBGC's decision not to terminate the CF&I Plan in May 1985 was in no way affected by the

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[2] Petitioner's argument by sound bite, using phrases such as "bankrupt company" and "contrary to everything 'moral, ethical, sound business practice, common sense and the American way'" is a shameless distortion of the record. The quoted phrases do not refer to CF&I's financial condition at the time of the spinoff, as petitioner well knows.

nonfiling of the additional NRE which petitioner claims should have been filed.

The Circuit Court concluded:

> "Crane's evidence—the PBGC's policy against involuntarily terminating a plan when it had sufficient assets to pay current benefits, the CF&I plan's ability to pay benefits as they came due in 1985, the fact that the spin-off did not warrant an involuntary termination in 1985, the PBGC's subsequent refusal to terminate the plan in 1987, and the fact that the plan would not have been terminated in 1985 even if the PBGC determined that CF&I's liquidation or inability to make benefit payments was inevitable so long as those events did not occur for more than one year—overwhelmingly establishes that the PBGC would not have terminated CF&I's plan in 1985." (at A11)

Crane's proof that the PBGC's decision not to terminate the CF&I Plan in May 1985 was unaffected by the nondisclosure complained of by petitioner was only one of two grounds upon which Crane's motion for summary judgment was granted by the courts below. The Hon. Jean C. Hamilton, Chief Judge of the District Court for the Eastern District of Missouri, granted Crane's motion for summary judgment on the grounds that Crane made no statements of any kind to the PBGC and was not, under the applicable PBGC regulations, obligated to make any statements to the PBGC, directly or indirectly. The party responsible for filing an NRE with the PBGC was not Crane, but the Plan Administrator, who was Mr. Hegstrom, a CF&I employee in May 1985, and CF&I itself at later times. ERISA imposes a secondary duty of disclosure on certain entities if they have knowledge of events reportable in an NRE. That secondary duty was, however, imposed only on "employers making contributions". 29 U.S.C. § 1343(a). Since it was undisputed that Crane had never made

contributions to the Plan, the District Court properly concluded that Crane had no disclosure obligations to the PBGC. In the District Court's words:

> "Plaintiffs have failed to demonstrate a material factual dispute as to whether Crane was involved in or legally responsible for any false record or statement to the PBGC. The Court concludes that Crane in fact had no obligation . . . to make any disclosures to the PBGC." (at A49)

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE EIGHTH CIRCUIT'S DECISION AFFIRMING THE GRANT OF SUMMARY JUDGMENT WAS CORRECT AND DID NOT CONFLICT WITH THIS COURT'S DECISION IN *AFFILIATED UTE.*

The Eighth Circuit's decision affirming the grant of summary judgment to respondent Crane was correctly decided and involves no issue worthy of *certiorari*. As the Circuit Court framed the problem:

> "If Rabushka cannot show that the PBGC would have terminated CF&I's pension plan in 1985 had it known that the spinoff was a transaction to implement CF&I's liquidation, then there is no false claim because the PBGC's payment of CF&I's unfunded pension liabilities would have occurred regardless of Crane's actions." (at A8)

The Court went on to hold that: "Crane's evidence . . . overwhelmingly establishes that the PBGC would not have terminated the CF&I Plan in 1985" regardless of any disclosure or nondisclosure by Crane. (at A11)

In reaching this decision, the Circuit Court relied on the following evidence. (at A9-12) The PBGC tendered Mr. Royal Dellinger as their 30(b)(6) witness relating to the PBGC's decision not to terminate the plan in May 1985. Mr. Dellinger was the PBGC's deputy executive and chief negotiating officer during the 1980s. He testified that during the relevant time period, the PBGC's policy was not to terminate pension plans unless they were unable to pay benefits when due or were abandoned by the employer. (at A9) He testified that the PBGC would not terminate a plan on the grounds that the plan would not be able to pay benefits at some subsequent period unless it was unable to make those payments in the immediate future, which meant within the ensuing twelve months. (at A9-11)

Mr. Dellinger testified that the CF&I spinoff did not warrant termination of the Plan. (at A9-10) Mr. Dellinger testified that the PBGC would not have terminated the CF&I Plan, whether or not it was deemed a transaction to implement a liquidation, if the spinoff would not have led to the cessation of payments to its pension beneficiaries within a year. (at A10)

The Circuit Court also relied on the fact that CF&I approached the PBGC in 1987 in an effort to persuade the PBGC to terminate its pension plan and was turned down. (at A10) During those meetings, Mr. Crocker Nevin, Chairman of CF&I, reported "the details of CF&I's current and future financial condition to the PBGC, including the fact that its pension plan was underfunded by $120 million". (at A10)

Petitioner offered no evidence to rebut Crane's showing in support of its motion. Petitioner produced no witness who contradicted the PBGC's description of its own policies. In his petition, petitioner argues that Mr. Dellinger testified that the PBGC "would have reviewed the case differently" if CF&I had stated that the spinoff constituted a liquidation of the company. (Petition, at 5) However, Mr. Dellinger also testified that he did not "believe that it [the PBGC] would have

taken action based on that assertion", and that he meant only that "the agency would have initiated an effort to find out if in fact a liquidation was going to occur". (at A11) None of that testimony comes close to any conflict with Mr. Dellinger's basic and often-repeated statement that the PBGC would not have terminated the CF&I Plan unless it became apparent that the Plan would be unable to make pension payments within the year. (at A9-A11)

Petitioner also argues that the fact that the PBGC terminated the CF&I Plan in March 1992, some seven years after the May 1985 spinoff, proves that the PBGC would have terminated the CF&I Plan in 1985 if a second NRE had been filed. The Eighth Circuit correctly rejected petitioner's argument: "we do not find persuasive Mr. Rabushka's speculation based solely on the PBGC's 1992 termination of CF&I's plan . . . ." (at A12) In reaching this conclusion, the Eighth Circuit emphasized the difference in the Plan's financial condition in 1985 as compared to 1992. "In 1985, the plan had $45 million in assets to pay $5 to $6 million in benefits per year. In 1992, it had only $35 million in assets to pay $18 million in benefits per year." (at A12) Moreover, in 1985 CF&I had emerged from its 1982 reversal and was generating a positive cash flow and record working capital levels. By 1992, CF&I had been in bankruptcy for over a year and was unable to satisfy its funding obligations to the Plan under ERISA.

Based on this evidence, the Eighth Circuit properly concluded that respondent Crane was entitled to summary judgment because the overwhelming evidence established that the PBGC's decision not to terminate the CF&I Plan in May 1985 was based on the Plan's ability to pay its current pension obligations and was not affected by any disclosure or nondisclosure by Crane.

Petitioner's argument that the Eighth Circuit's opinion conflicted with the Court's opinion in the *Affiliated Ute* case is

based on a misinterpretation of that case. Every Circuit Court which has considered the issue has ruled that the presumption of reliance set forth in *Affiliated Ute* may be rebutted. *Du Pont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987); *Rochez Bros., Inc. v. Rhoades*, 491 F.2d 402, 410 (3d Cir. 1973); *Carras v. Burns*, 516 F.2d 251, 257 (4th Cir. 1975); *Mason v. Marshall*, 531 F.2d 1274, 1274 (5th Cir. 1976); *Chelsea Associates v. Rapanos*, 527 F.2d 1266, 1271-1272 (6th Cir. 1975); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1048 (7th Cir. 1977); *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 562 F.2d 1040, 1048 (8th Cir. 1977); *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975); *Ross v. Bank South, N.A.*, 885 F.2d 723, 738 (11th Cir. 1989).

As the Third Circuit explained in *Rochez Brothers*, 491 F.2d at 410:

> "We do not read [the *Affiliated Ute*] decision to say that the question of reliance *vel non* may not be considered at all in a non-disclosure case, but only that proof of reliance is not required for recovery. If defendant is able to demonstrate that there was clearly no reliance, that is, that even if the material facts had been disclosed, plaintiff's decision as to the transaction would not have been different from what it was, then the non-disclosure cannot be said to have caused the subsequent loss and under the ordinary principles of the law of fraud, recovery should be denied."

In accordance with these authorities, Crane rebutted any presumption of reliance which might arise as a result of the nondisclosure that the spinoff of CF&I was a transaction to implement a liquidation. In the words of the Eighth Circuit, Crane's evidence "overwhelmingly establishes" that the PBGC's decision not to terminate the CF&I Plan in May 1985 was not and could not have been affected in any way by the nondisclosure complained of by Rabushka. (at A11) The

Eighth Circuit's decision is, therefore, both correct and consistent with the Court's decision in *Affiliated Ute*.

Petitioner proceeds to argue that the Eighth Circuit erred in disregarding his argument that the PBGC "should have" terminated the CF&I Plan. Petitioner attacks the PBGC's policies as "irrational" and claims that a St. Louis jury should decide whether the PBGC should have terminated the CF&I Plan, regardless of the policies which the PBGC was in fact following during the 1980s.

The PBGC approached the decision whether to terminate a pension plan with appropriate care. Termination of a pension plan inflicts serious injury on the plan's beneficiaries. Termination interrupts the accrual of pension benefits by the beneficiaries. Termination results in forfeiture of pension benefits by beneficiaries whose pension rights are not yet vested. Termination also imposes liability for the payment of future pensions on the PBGC. These considerations led the PBGC to adopt a policy of refraining from the termination of a plan unless and until it became clear that the plan would be unable to pay benefits in the very near future. There is nothing "irrational" about that policy. The policy represents a reasoned compromise between a number of the PBGC's conflicting objectives.

In any event, petitioner's view of the wisdom of the PBGC's termination policies does not constitute a grounds for granting *certiorari* in this case. Petitioner's disagreement with the PBGC's termination policies does not raise an issue which can be determined by a St. Louis jury in the context of a False Claims Act case. Petitioner's argument that the PBGC should have followed different termination policies does not constitute circumstantial evidence of reliance by the PBGC.

Whether the PBGC's termination policies during the 1980s were within the authority granted by ERISA is a decision which a Federal court could decide in an action brought by a

proper party. In the context of such an action, the question would be a question of law to be decided by the Court, not a question of fact to be decided by a jury. Petitioner's argument is, however, most decidedly not circumstantial evidence of whether the PBGC would have terminated the CF&I Plan if CF&I had filed an NRE describing the spinoff as a transaction to implement a liquidation.

II.

DISMISSAL OF THE ACTION BY THE COURT BELOW WILL NOT BE AFFECTED BY THIS COURT'S REVIEW OF THE ISSUES PRESENTED BY PETITIONER.

"If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, *certiorari* may be denied." Robert L. Stern & Eugene Gressman, *Supreme Court Practice*, 272 (5th ed. 1978) (relying on *Sommerville v. United States*, 376 U.S. 909 (1964), where it was evident that resolution of the conflict would not change the result reached below). The grant of summary judgment below will not be affected by this Court's review of the issues presented by petitioner. The courts below granted Crane's motion for summary judgment on two independent grounds. Chief Judge Jean C. Hamilton of the United States District Court for the Eastern District of Missouri granted summary judgment because petitioner failed to establish that Crane made any disclosure to the PBGC or had any duty to make any disclosure to the PBGC. (at A49) The District Court's decision was correct and involves no issue worthy of *certiorari*.

It was undisputed that Crane made no disclosures to the PBGC in connection with the spinoff of CF&I. (at A47) The pension plan in question was a plan established and maintained by CF&I for its employees. (at A18) The plan was funded and administered by CF&I. Crane never made any contributions to

the CF&I Plan. (at A46) Crane's relationship to CF&I and the Plan consisted of Crane's role as the parent corporation of CF&I from 1969 to May 1985. (at A18)

Under ERISA and the PBGC regulations, reporting requirements relating to pension plans covered by ERISA are imposed on the Plan Administrator. (at A18) Mr. Lawrence Hegstrom, a CF&I employee, was the Plan Administrator for the CF&I Plan from 1977 through 1986. (at A18) Included in Mr. Hegstrom's duties was the duty to file Notices of Reportable Events or NREs with respect to the CF&I Plan. (at A18) Mr. Hegstrom did timely file an NRE under 29 C.F.R. § 2615.23 in connection with the May 1985 spinoff, notifying the PBGC of "a transaction involving a transfer . . . of ownership interest in a contributing sponsor" and supplying all the information required, including the most recent financial statements of CF&I and the Plan.

As the District Court summarized the matter: "The undisputed evidence shows that Mr. Hegstrom, other CF&I employees and CF&I's actuaries and accountants were responsible for all PBGC filings concerning CF&I's Pension Plan and that Crane did not attempt to influence those filings". (at A18)

The District Court then turned to petitioner's argument that Crane had violated its asserted duty to advise the Plan Administrator of its knowledge of a reportable event. The Court correctly identified 29 U.S.C. § 1343(a) as the controlling provision. That section provides: "Whenever an *employer making contributions under a plan* . . . knows or has reason to know that a reportable event has occurred, he shall notify the plan administrator immediately" (emphasis added). (at A45) It was undisputed that Crane had never made any contributions to the CF&I Plan. As a result, "the Court finds that Crane was not an 'employer making contributions' within the meaning of 29 U.S.C. § 1343(a) and that Crane therefore

had no reporting obligations to the CF&I Plan Administrator". (at A46)

The District Court's decision was plainly correct and independently dispositive of petitioner's claim. Petitioner's action is, therefore, properly dismissible whatever view is taken of the issues raised in the petition.

III.

PETITIONER'S ACTION IS DISMISSIBLE ON A VARIETY OF OTHER INDEPENDENT GROUNDS.

Resolution of the issues raised by the Petition for Writ of *Certiorari* would not affect the result in this case in any event. Petitioner's action against Crane is dismissible on a variety of other grounds.

Petitioner's claim of actionable nondisclosure rests on his assertion that someone should have disclosed to the PBGC the alleged opinions of certain Crane officers that CF&I would go bankrupt at some unspecified time after the May 1985 spinoff. For present purposes, Crane passes the question of whether any Crane officer actually held such an opinion, noting only that such an opinion would have been inconsistent with CF&I's improved financial condition in May 1985 and, most importantly, with CF&I's operating plans for 1985 through 1988 which forecast increasing sales and earnings throughout the period. *See* p. 3, *supra*.

For present purposes, it is sufficient to point out that under federal law a prediction of future events cannot constitute the basis for a fraud claim except in certain circumstances not here present. *See, e.g., In re The Bible Speaks*, 869 F.2d 628, 643 (1st Cir. 1989); *James v. Nico Energy Corp.*, 838 F.2d 1365, 1371 (5th Cir. 1988). In rare circumstances, opinions may constitute the basis for a fraudulent misrepresentation where the defendant holds himself out as an expert and does not, in

fact, hold the opinion he expresses. *See, e.g., Harazim v. Lynam*, 267 Cal. App. 2d 127, 132-133 (Cal. Ct. App. 1968).

That doctrine can have no application to this case for the simple reason that no opinion was expressed. In a nondisclosure case, unspoken predictions of future events cannot constitute false statements. Petitioner's claim fails to state a cause of action for that reason alone.

Petitioner's claim is also dismissible because this case involved no actionable false claims. Crane made no claim of any kind upon the Government. The claims made by the CF&I pensioners could not be false claims. There is no allegation that the CF&I pensioners' claims against the PBGC involved any false statements by them. The PBGC was obligated to pay those claims as the insurer of pension plans under ERISA. If anything, petitioner's claim involved a so-called "reverse false claim"; that is, the PBGC may have had a theoretical claim against Crane for reimbursement of its payments to CF&I Plan beneficiaries because, under circumstances not here present, the PBGC may assert claims against the parent corporation of a subsidiary, such as CF&I, whose plan is terminated.

However, there was no liability for reverse false claims prior to the amendment of the False Claims Act as of January 1986. All Circuit Courts to have considered the 1986 amendments have declined to apply them retroactively. *See Miller v. Federal Emergency Management Agency*, 57 F.3d 687, 689 (8th Cir. 1995); *United States v. TDC Management Corp., Inc.*, 24 F.3d 292, 298 (D.C. Cir. 1994); *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1266 (1st Cir. 1992); *United States v. Murphy*, 937 F.2d 1032, 1038 (6th Cir. 1991).

Both the District Court and the Circuit Court, therefore, correctly concluded that petitioner's claim stated no actionable reverse false claim. (at A12, A40) Since petitioner's claim stated neither an actionable false claim nor an actionable reverse false claim it should have been dismissed on that

ground as well. *See United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605 (8th Cir. 1992). The District Court erroneously analogized this case to certain cases in which defendants had obtained funds using innocent third parties as conduits and denied Crane's motion to dismiss on these grounds. (at A34) In doing so, the court overlooked the fact that Crane never received any funds from the Government directly or indirectly.

Crane's only potential involvement with the Government in this matter arose from the fact that Crane might have had an obligation to the PBGC, not a claim against it. The nature of Crane's involvement meant that the only conceivable claim against Crane under the False Claims Act would have been as a reverse false claim. Since reverse false claims were not actionable prior to January 1, 1986, and the spinoff occurred in May 1985, petitioners had no actionable reverse false claim.

Petitioner's claim is also dismissible because ERISA vests the power to enforce reporting requirements in the PBGC and does not confer standing on private parties. *See* 29 U.S.C. §§ 1302, 1309. Petitioner's complaint is an attempt to recast alleged violations of ERISA reporting requirements as false claims under the False Claims Act. Petitioner's false statement allegations, however, are in fact claims of highly technical alleged violations of ERISA and PBGC regulations. Specifically, petitioner claims that an NRE describing the 1985 spinoff as a transaction to implement a liquidation under 29 C.F.R. § 2615.22 should have been filed along with the NRE which Mr. Hegstrom actually did file under 29 C.F.R. § 2615.23, describing the spinoff as "a transaction involving a transfer of . . . an ownership interest in a contributing sponsor."

The Federal courts have held that where Federal legislation enacts a statutory scheme involving a complex regulatory procedure and vests enforcement authority in a government agency, the courts should not construe statutes of general application such as the False Claims Act to vest rights

of action in private individuals. For example, Federal courts have ruled that a private party may not bring RICO actions complaining of alleged violations of the Service Contract Act. *Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1226 (D.C. Cir. 1991).

That doctrine is clearly applicable to this case.

ERISA established the PBGC to administer and enforce its provisions. 29 U.S.C. § 1302. Title IV provides that to carry out its purposes, the PBGC is empowered " to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." 29 U.S.C. § 1302(b)(1). Moreover, the PBGC is authorized to bring "[c]ivil actions . . . for appropriate relief, legal or equitable or both, to enforce the provisions of [Title IV]". 29 U.S.C. § 1303(e)(1).

Title IV outlines the circumstances in which the PBGC may institute proceedings to terminate a pension plan and sets forth procedures for such termination by the PBGC. 29 U.S.C. § 1342. The decision whether to terminate a plan is within the sole discretion of the PBGC. *See* 29 U.S.C. § 1342(a)(1), (2) & (3). If the PBGC terminates a plan with insufficient assets, ERISA authorizes the PBGC to impose liability on the employer who maintained that plan. *See* 29 U.S.C. § 1362.

Title IV provides a comprehensive remedial scheme. Title IV does not empower any person or entity other than the PBGC to bring an action to terminate a plan under § 1342. Nor does Title IV empower any person or entity other than the PBGC to assert claims against an employer under § 1343 for alleged violations of ERISA's reporting obligations. Prior to 1986, Title 1 of ERISA was the only portion of the statute which provided for private enforcement. 29 U.S.C. § 1132(a). Section 1132(a) allows plan participants, beneficiaries, and fiduciaries, as well as the Secretary of Labor to bring a "civil action . . . for appropriate relief" for violations of the

provisions of that subchapter. *See Varity Corp. v. Howe*, 116 S. Ct. 1065, 1075 (1996). The creation of private cause of action under § 1132(a)(2) makes clear that Congress addressed the issue of private party standing and provided for it where intended. It is equally clear that ERISA does not confer standing on petitioner.

Since petitioner's claim, in fact, alleged nothing more than an asserted technical violation of PBGC reporting regulations, it may not be brought as a False Claims Act action.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be denied.

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Respectfully submitted,

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